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SEP - 1 2004

Federal Communications Commission
Office of Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: Transfer of licenses from AT&T Wireless to Cingular Wireless
WT Docket No. 04-07
Ex Parte

Dear Ms. Dortch:

On August 31, 2004, Cingular Wireless LLP (Cingular) represented by Brian Fontes, Vice President, Federal Relations met with Sam Feder, Wireless Legal Advisor to Commissioner Kevin Martin, to review the filings in WT Docket No. 04-07.

Sincerely,

Brian F. Fontes
Vice President, Federal Relations

Cc: Sam Feder

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EX PARTE OR LATE FILED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED & INSPECTED

SEP 1 2004

FCC - MAILROOM

In the Matter of

Federal-State Joint Board on Universal Service

Petition for FCC Agreement in Redefining the
Service Areas of Rural Telephone Companies
In the State of Oregon

EX PARTE COMMENTS OF THE OREGON
PUBLIC UTILITY COMMISSION

To: Chief, Wireline Competition Bureau

The Oregon Public Utility Commission (OPUC) provides these ex parte comments for consideration by the Federal Communications Commission (FCC) in conjunction with the petition by OPUC seeking FCC agreement with the redefinition of the service areas of several Oregon incumbent local exchange carriers (ILECs).¹ The FCC adopted rules providing a mechanism for achieving service area redefinition.² As noted by the Federal-State Joint Board on Universal Service (Joint Board), the FCC's intent in adopting these procedures was, in part, to minimize administrative delay.³ Consistent with that intent, there is no reason for the FCC to initiate a proceeding or otherwise delay its approval of the redefinition.

I. SUMMARY OF COMMENTS.

Initiation of a FCC proceeding in this matter is unwarranted. Federal statute imbues the state commissions with the authority to designate carriers satisfying the requirements of the federal universal service rules as ETCs and to define their service

¹ Redefinition is required to effectuate OPUC Order Nos. 04-355 and 04-356. See *In the Matter of RCC Minnesota, Inc., Application for Designation as an Eligible Telecommunications Carrier, Pursuant to the Telecommunications Act of 1996*, UM 1083, Order No. 04-355 (June 24, 2004) (RCC Order) and *In the Matter of United States Cellular Corporation, Application for Designation as an Eligible Telecommunications Carrier, Pursuant to the Telecommunications Act of 1996*, UM 1084, Order No. 04-356 (June 24, 2004) (USCC Order).

² See 47 C.F.R. § 54.207.

³ *In the Matter of Federal-State Joint Board on Universal Service*, FCC 04J-1, 19 FCC Rcd 4257 (rel Feb 27, 2004) (Recommended Decision), ¶ 51 and note 132.

areas.⁴ Indeed, the Joint Board recently acknowledged both the lawful rights of the states to make ETC designations, and the advisory nature of the FCC's role in the ETC designation process.⁵ The state of Oregon has exercised its rights under section 214(e) to consider the applications of RCC Minnesota, Inc. (RCC) and United States Cellular Corporation (USCC) for designation as federal eligible telecommunications carriers. In so doing, the State of Oregon also placed additional requirements on RCC and USCC to ensure continued compliance with ETC requirements.⁶ The FCC should not disturb the considered and lawful decisions of the OPUC.

The OPUC is best suited for determining the granting of ETC applications, and proposing study area redefinition, within the State of Oregon. It did so with the applications of RCC and USCC after developing and considering a substantial record. OPUC did so after considering and applying the permissive federal guidelines suggested by the FCC in *Virginia Cellular*⁷ and *Highland Cellular*.⁸ OPUC considered and rejected the arguments advanced by CenturyTel⁹ and Oregon Tel¹⁰ during the hearings on the ETC applications; a process wherein CenturyTel and Oregon Tel expressly stated they

⁴ 47 U.S.C. § 214(e).

⁵ Recommended Decision, ¶¶ 2, 5 and 7. *See also*, ¶ 10 ("Each state commission will be uniquely qualified to determine its own ETC eligibility requirements as the entity most familiar with the service area for which ETC designation is sought. Because these guidelines would be permissive, we reject the parties' arguments suggesting that such guidelines would restrict the lawful rights of states to make ETC designations.")

⁶ Appendix A to these Ex Parte Comments sets forth a list of most of the requirements. *See also*, RCC Order, pp. 16-17; USCC Order, pp. 16-17.

⁷ In the Matter of Federal-State Joint Board on Universal Service; Virginia Cellular, LCC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, FCC 03-338 (rel. January 22, 2004). The applicant filed a Petition for Reconsideration on February 23, 2004, challenging the portion of the Order denying designation in the Ntelos Service Area.

⁸ In the Matter of Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, FCC 04-37 (rel. April 12, 2004).

⁹ CenturyTel of Oregon, Inc. and CenturyTel of Eastern Oregon, Inc.

¹⁰ Oregon Telephone Corporation.

would not oppose redefinition. These current challenges are nothing more than inappropriate attempts to circumvent the process. The FCC should not interject itself into the process, given these circumstances.

The FCC should concur with the redefinition, and allow the rural citizens of Oregon the earliest opportunity possible to benefit from high-cost support in the redefined areas.

II. OPUC IS BEST ABLE TO DETERMINE THE PROPRIETY OF REDEFINITION.

The OPUC is the agency best suited for determining study area redefinition within the State of Oregon, a fact acknowledged by the Joint Board.¹¹ The Joint Board, in discussing 47 U.S.C. § 214(e)(2), commented, “We believe this statutory requirement demonstrates Congress’s intention that state commissions evaluate local factual situations in ETC cases and exercise broad discretion in reaching their ultimate conclusion regarding the public interest, convenience and necessity.” The records relating to the RCC and USCC federal ETC applications were developed over a twelve month period. The OPUC granted the federal ETC applications of RCC and USCC after considering a week of oral testimony, and after reviewing thousands of pages of written testimony and other evidence. The decision to grant the applications, including study area redefinition, was a considered and informed decision by the agency best suited to make such a decision – OPUC. It should not now be undermined.

III. DESIGNATIONS WERE MADE USING FEDERAL GUIDELINES.

The OPUC granted the federal ETC applications of RCC and USCC, only after a rigorous examination of the evidence, using the most recent permissive federal guidelines espoused in the *Virginia Cellular* and *Highland Cellular* decisions. OPUC devotes almost half of its orders granting RCC and USCC federal ETC status to the public

¹¹ Recommended Decision, ¶ 10.

interest analysis, with most of the discussion addressing the application of *Virginia Cellular* and *Highland Cellular* analyses.¹² There is no reason for the FCC to second guess the OPUC's determinations.

IV. OPUC ALREADY CONSIDERED THE CONCERNS OF CENTURYTEL AND OREGON TEL IN REACHING ITS ORDERS GRANTING FEDERAL ETC STATUS TO RCC AND USCC.

The concerns of CenturyTel and Oregon Tel are not redefinition issues. Rather, they are public interest concerns; concerns that already have been considered and addressed by the OPUC in the federal ETC designation proceedings. It is inappropriate for CenturyTel and Oregon Tel to raise the public interest concerns herein, just as it is inappropriate for the FCC to now consider those concerns.¹³

A. The OPUC Considered CenturyTel's Concerns.

The OPUC already considered the concerns of CenturyTel as part of its analysis of the federal ETC applications of RCC and USCC. The OPUC reached its decision to grant the applications after considering all the evidence and arguments, including those of CenturyTel. The FCC is not required to initiate proceedings in this matter, notwithstanding CenturyTel's urgings to the contrary. This is especially true given OPUC found granting the applications of RCC and USCC to be in the public interest, applying the permissible federal guidelines set out in *Virginia Cellular* and *Highland Cellular*. As noted above, OPUC also imposed additional requirements on RCC and USCC to ensure compliance with all ETC obligations.

¹² RCC Order, pp. 7-14; USCC Order, pp. 6-14

¹³ As set forth on page fifteen (15) of both the RCC Order and the USCC Order, CenturyTel and Oregon Tel, through their membership in the Oregon Telecommunications Association (OTA), agreed not to challenge redefinition. The OPUC further notes CenturyTel individually agreed not to challenge redefinition if the OPUC found the applications were in the public interest and there was no danger of cream skimming. See Opening Brief of CenturyTel, *et al.*, Docket UM 1083 at 31-32 (Feb 12, 2004); Opening Brief of CenturyTel, *et al.*, Docket UM 1084 at 39 (April 7, 2004).

It is flawed logic for CenturyTel to argue RCC and USCC were able to “pick and choose” the individual wire centers they would serve. Wireless carriers cannot “pick and choose” the wire centers or rural ILEC study areas they wish to serve. Wireless carriers are limited to serving wire centers falling within their CGSA¹⁴. Moreover, Oregon and most other jurisdictions require the wireless ETCs to serve its entire CGSA as another means of reducing potential cream skimming issues. Thus, there is no ability to “pick and choose.”

It is important to remember the OPUC already has determined there is no cream skimming – intentional or otherwise – resulting from designating RCC and USCC as federal ETCs. The OPUC reached its conclusion after carefully analyzing the considerable record in the dockets, and after applying the permissive federal guidelines used by the FCC in *Virginia Cellular* and *Highland Cellular*. CenturyTel serves a sizable geographical area. Its exchanges are non-contiguous and range from the Portland Metro area to rural Eastern Oregon. The FCC has explained rural cream skimming “occurs when competitors serve only the low-cost, high revenue customers in a rural telephone company’s study area.”¹⁵ There is no cream skimming in the areas for which redefinition is requested. The evidence demonstrates the average cost per line for Century Tel is \$54.37. The average cost per line in the area to be served by RCC is \$72.88¹⁶ while it is \$68.60 in the area to be served by USCC.¹⁷ This evidence aptly demonstrates RCC and USCC are not serving only the low-cost areas in CenturyTel’s study area.

¹⁴ As noted by the FCC in *Highland Cellular*, p. 14, for wire centers not entirely covered by the wireless carrier’s CGSA, the wireless carrier has the option of withdrawing those particular wire centers from its ETC application or commit to providing service throughout the entirety of the wire centers through resale in those areas outside the CGSA of the wireless carrier.

¹⁵ *Highland Cellular*, p. 13 (Emphasis added).

¹⁶ RCC Order, p. 12.

¹⁷ USCC Order, p. 11.

There is no valid reason for the FCC to delay its concurrence in this matter until after the CETC proceeding¹⁸ is concluded. The FCC did not delay the *Virginia Cellular* or *Highland Cellular* redefinitions and it should not delay this petition since the ETC designations were granted using the permissive federal guidelines. In not delaying its decision, the FCC explained in *Highland Cellular*:

Finally, we note that the outcome of the Commission's pending proceeding, now before the Joint Board, examining the rules relating to high-cost universal service support in competitive areas could potentially impact the support that Highland Cellular and other ETCs may receive in the future.¹⁹

There is no reason for the FCC to delay this petition or deny the rural citizens of Oregon the earliest opportunity possible to benefit from high-cost support in the redefined areas.

B. The OPUC Considered the Concerns of Oregon Tel.

The OPUC already considered the concerns of Oregon Tel as part of its analysis of the federal ETC applications of RCC and USCC. The OPUC reached its decision to grant the applications after considering all the evidence and arguments, including those posited by Oregon Tel.

Oregon Tel argues OPUC wrongly concluded there was no de facto cream skimming by USCC in the Oregon Tel study area.²⁰ OPUC expressly considered this argument in its Order.²¹ OPUC analyzed the densities of the five wire centers in the OregonTel study area and found an average density of 1.2 households per square mile. The three wire centers to be served by USCC have an average density of 1.3 households per square mile. This empirical evidence satisfied the OPUC that there was no de facto

¹⁸ Public Notice, *Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process*, FCC 03J-1, CC Docket No. 96-45 (rel. Feb. 7, 2003).

¹⁹ *Highland Cellular*, p. 7.

²⁰ RCC will serve all five wire centers in the Oregon Tel study area while USCC will serve three of the five wire centers.

²¹ USCC Order, pp. 11-12 and Appendix B.

cream skimming. As OPUC noted in its Order, if Oregon Tel truly believes there is de facto cream skimming, Oregon Tel may choose to disaggregate.²²

Oregon Tel also speculates, without support, that redefinition “could result in significant declines in USF for [Oregon Tel] customers.”²³ Oregon Tel provided no evidence in UM 1084 to support this concern. OPUC expressly considered the potential impact of designation on the Universal Service Fund. Following the action of the FCC in *Virginia Cellular*, OPUC concluded USF fund concerns did not justify denying the USCC application.²⁴

Finally, Oregon Tel asks the FCC to conclude that USF payments must be used in the specific area from which the monies are received. For example, Oregon Tel argues the monies received for lines in Prairie City must be spent in Prairie City. Oregon Tel did not raise this issue before the OPUC. Nonetheless, no statute or regulation currently requires such targeting, nor has the FCC proposed such in its permissive guidelines. Rather, the FCC prudently albeit implicitly has recognized imposing such a requirement would frustrate the practicalities of building out a network, especially a wireless network that transcends multiple study areas.

²² USCC Order, p. 12.

²³ Reply Comments of Oregon Telephone Corporation, p. 3.

²⁴ USCC Order, p. 10.

V. **CONCLUSION.**

There is no need for the FCC to initiate a proceeding or otherwise delay its approval of the redefinition. The FCC should concur with the redefinition, and allow the rural citizens of Oregon the earliest opportunity possible to benefit from high-cost support in the redefined areas.

DATED this 30th day of August 2004.

Respectfully submitted,

Attorney General



Charles D. Ferrari, #92021
Of Attorneys for Oregon Public Utility
Commission

Appendix A
Annual Reporting Requirements Imposed on
RCC Minnesota, Inc. and United States Cellular Corporation

- (a) Line counts for federal USF supported services, itemized by rural ILEC wire center, as of December 31 of the preceding year;
- (b) The amount of federal USF support the ETC received for operations in Oregon during the period January 1 through December 31 of the preceding year;
- (c) A description of how the federal USF support was used in the previous year. For expenses such as maintenance and provisioning, the information should be segregated by major expense category. For investments, this information should be segregated by asset type and the rural ILEC wire center where the investment was made;
- (d) An estimate of the federal USF support to be received during the current year and a detailed budget of how such support is expected to be used, as described in (c);
- (e) Documentation establishing the ETC advertised the supported services throughout the entire designated area;
- (f) As to requests for service coming from areas within the ETC's designated area, but outside of its CGSA (Cellular Geographic Service Area), a report listing the number of requests and, for requests where service was not provided, the reason(s) service was not provided;
- (g) A description of actions taken to enhance wireless Internet service throughout the ETC area in the past year and plans to enhance such service in the current year; (h) A description of how many service quality complaints were received, by wire center, and how those complaints were resolved; (i) An affidavit from an ETC official stating that either: (i) The ETC has resale agreements in place that cover the portions of wire centers that are within its ETC boundary but outside its CGSA; or (ii) The ETC has not received any requests for service that are not covered by resale agreements; and
- (j) If the ETC has received requests for service in portions of wire centers that are within its ETC boundary but outside its CGSA, the ETC shall provide: (i) A description of the steps taken by the ETC to obtain a resale agreement with other telecommunications service providers in order to provide service to the requesting party; (ii) Whether each party requesting service eventually received such service via the ETC acting in the capacity of a reseller; and (iii) The ETC's estimated timeframe for negotiating resale agreements in each wire center where it was unable to accommodate a request for service because the ETC had no existing resale agreement in place.

CERTIFICATE OF SERVICE

I certify that on August 31, 2004, I served the foregoing EX PARTE
COMMENTS OF THE OREGON PUBLIC UTILITY COMMISSION upon the parties
hereto by sending a true, exact and full copy by regular mail, postage prepaid to:

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